No. 8809

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOE MAZUROSKY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

BRIEF OF APPELLANT

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JURISDICTION

This is a criminal action in which the jurisdiction of this Court and the District Court has been invoked under the provisions of Sections 88 and 338 of Title 18, U. S. C. A., penal statutes of the United States. The action was instituted by indictment of a Grand Jury of the United States States District Court for the District of Oregon.

STATEMENT OF THE CASE

THE INDICTMENT

The Indictment contains eight counts, the first six of which were predicated upon Section 338 of Title 18, U. S. C. A., and the last two upon Section 88 of the same Title. A verdict of not guilty was returned by direction of the Court upon all counts save those numbered 4, 7 and 8, and a verdict of guilty was returned by the jury on said three counts, and Judgment was entered thereon. (R. 41, 42, 43.)

Count IV

This is a substantive Count in which it is charged that on or about the 28th day of September, 1935, the defendant wilfully and feloniously placed and caused to be placed in the United States Post Office at Kennewick, Washington, and sent and delivered to the addressee thereof by the postal establishment of the United States, according to the address thereon, a letter addressed to the Bank of California, at Portland, Oregon, from the First National Bank, Kennewick, Washington, which said letter contained a bank draft drawn to the favor of the Bank of California upon the First National Bank of Portland, in the sum of $499.50. It is alleged that the defendant in combination with one Frank Faircloth and other named parties to an alleged scheme to defraud, had procured, pursuant to said scheme, a check in the sum of $500.00 from one H. F.

Belter and that the defendant, for the purpose of executing said scheme and artifice to defraud, had caused the mails to be used as above set forth.

The alleged scheme is incorporated in this Count of the Indictment by reference to the allegations of Count 2 thereof in which it is alleged that the defendant and his confederates would represent themselves as qualified to treat various diseases of the eye and in doing so would perform fraudulent operations on the eye of the particular party for which substantial charges were made.

Count VII

This is a conspiracy Count in which it is alleged that the defendant conspired with one Roy L. Martin, and others, on or prior to September 12, 1934, to violate Section 338 of Title 18, U. S. C. A., in the use of the United States mails to defraud. The fraudulent scheme is alleged by reference to Count I of the Indictment, in which it is set forth that the defendant and his confederates would represent themselvs as qualified to treat various diseases of the eye and in doing so would prescribe "Radium Water" and "Radium Belts," all of which were fraudulent, and that substantial charges would be made therefor. It is further alleged that it was the intention of the defendant and his co-conspirators that the U. S. mails should be used to effect the objects of said conspiracy. Five overt acts are set forth which

embrace two alleged fraudulent transactions under said conspiracy, to-wit, those which may be styled for convenience of reference, the "Mershon" transaction, and the "Allen" transaction, respectively.

Count VIII

This is a second conspiracy Count under the same Section of the Statute noted for Count 7. The conspiracy is alleged to have been formed on or prior to September 12, 1934. The alleged scheme is the same as that noted in Count 4 of the Indictment, and the violations set forth in Counts Numbered 2, 3, 4, 5 and 6 are incorporated by reference as embraced within the conspiracy and said acts are styled in this Count as overt acts. Four additional overt acts are alleged which include, with those incorporated by reference to Counts Numbered 3, 4, 5 and 6, two alleged transactions which may be conveniently described as the "Belter" and "Deibert" transactions. It is alleged that it was the intention of the defendant and his alleged co-conspirators to use the United States mails in effectuating the conspiracy.

The defendant entered a plea of not guilty to each count of the indictment. (R. 36) The case was tried before the Honorable James Alger Fee, District Judge, and a jury, resulting in a verdict of guilty on Counts Numbered 4, 7 and 8 (R. 40). Judgment was entered on the verdict and sentence was imposed on March 19,

1938 (R. 43). Notice of Appeal was served and filed on March 24, 1938. (R. 3) The Bill of Exceptions was duly signed, settled and certified on April 23, 1938, within proper extension of time granted for that purpose. (R. 180-43-44) The assignments of error were filed on April 20, 1938. (R. 197)

The evidence introduced at the trial is summarized herein under the title "Summary of Evidence." At the close of the evidence the defendant made a motion for a directed verdict on the ground that ther was no substantial vidence sufficient to warrant a verdict of guilty as to any of the Counts of the indictment. This motion was over-ruled as to Counts 4, 7 and 8, and exception was taken thereto. (R. 153) Objections were interposed to some of the testimony offered by the United States, and received over objection, and exceptions were taken to the adverse rulings thereon. (R. 53, 56, 57) (R. 82, 138) (R. 68, 69, 70) (R. 72-73) (R. 89 to 95 inclusive).

The foregoing rulings present the questions raised on this appeal.

QUESTIONS PRESENTED

1. Whether there was any substantial evidence sufficient to warrant submission to the jury of Counts Numbered 4, 7 and 8 of the indictment.

2. Whether error was committed in admitting certain testimony in behalf of the United States.

SPECIFICATION OF ASSIGNED ERRORS

The assigned errors relied upon by the defendant are those numbered I (R. 181, 182); II (R. 183, 184; III (R. 185, '86); IV (R. '86, 187, 188); V (R. 189, 190); VI (R. 190 to 195 inclusive); all of which are set out in full hereinafter.

PERTINENT STATUTES

The defendant is charged in Count 4 of the indictment with violation of Sec. 338, Title 18, U. S. C. A., and the particular sub-division thereof which reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person within or without the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States . . . *or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, post card, package, writing, circular, pamphlet, or advertisement,* shall be fined not more than $1,000 or imprisonment not more than five years, or both.

The defendant is charged in Counts 7 and 8 of the indictment with violation of Sec. 88 of Title 18, U. S. C. A., which provides as follows:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisonment not more than two years, or both."

SUMMARY OF THE EVIDENCE

Preliminary Statement:

This summary of the evidence does not purport to be a summary of all the evidence. Five of the eight counts of the indictment were withdrawn from the jury at the close of the case, and it would not assist the court to detail the evidence relating strictly to these counts.

The evidence, for purposes of analysis, may be divided into four distinct classifications: (1) Evidence relating to the Wagner transaction consummated in 1925, and which embraces about one-third of the entire record. (2) Evidence of perpetration of the fraudulent scheme upon divers individuals by members of the separate conspiracies, as alleged in Counts 7 and 8. (3) Technical proof supplied by employees of the banks. (4) Evidence of certain statements made by the defendant and his relations with the two groups of conspirators; evidence of two checks received by the defendant from each of the two groups of conspirators,

totaling four in all, which said checks were shown to have been obtained pursuant to the execution of the fraudulent scheme.

(1) The evidence relating to the Wagner transaction is detailed with particularity, in an attempt to present a chronological and narrative statement thereof. This has necessitated skipping about from the testimony of one witness to another, to the end that the numerous links in this chain of evidence may be connected together to form an intelligible sequence. Without resort to such a method, any attempted summary of this line of proof would only add confusion to an already confused record.

(2) The testimony of the various witnesses who testified to the perpetration of the eye frauds upon them, has been practically eliminated from the summary of the testimony. It is not disputed that the actual conspirators did perpetrate the frauds upon the poor old people who testified in this behalf. It is not disputed, on the other hand, that the defendant had no connection whatsoever with the perpetration of these frauds. The only claim made by the Government is that the Defendant aided in furtherance of the fraudulent scheme by cashing, or attempting to cash certain checks obtained in execution of the fraudulent schemes. A summary of this line of proof would only add a rhythmic monotony to the review of the evidence without lending any assistance to the Court upon the questions presented.

(3) A substantial portion of the testimony relates to the technical proof supplied by employees of the various banks which handled the checks mentioned in the first six counts of the indicement, i. e., the Mershon check (Count 1), the Belter check (Counts 2, 3 and 4), and the Deibert checks (Counts 5 and 6). As already noted, the only portions of this testimony with which we are now concerned is that pertaining to the specific charge alleged in Count 4 of the indictment. The evidence in respect to this particular phase of the proof is summarized beginning at p. 23 of this brief.

(4) The evidence relating to certain statements made by the defendant, his relation with the two groups of conspirators and his method in cashing or attempting to cash the two checks obtained, respectively, in execution of each of the fraudulent schemes is set forth with particularity. It is upon this phase of the testimony that the essential contention in the case will be made by the government—on the subject of intent and on the question of whether the defendant was a party to the said fraudulent enterprises.

IMPORTANT EVIDENCE

Frank Nelson, alias Frank Faircloth, but commonly known as "Slats" Nelson, testified that he first met the defendant through a mutual acquaintance, Dr. Brown, shortly after the World War. Dr. Brown had an optical store adjoining the place of business of the defen-

dant at that time. The three visited together and were friendly (R. 50). This was in 1918 or 1919 (R. 61). After leaving the Army, Nelson entered the hotel business in Spokane and continued in that line of work for about four years, until "about 1925" (R. 61). While in Spokane, and apparently while operating the hotel, Nelson studied optometry for two years, and began practicing optometry in Spokane the latter part of 1924. He became a registered optometrist (R. 62). In 1925 Nelson discontinued the hotel business and the practice of optometry and began his criminal career in the "eye business," of which much will be seen as the theme progresses (R. 61). During the year 1925, and prior to November of that year, Nelson associated himself with the Dr. Brown previously mentioned, in the carrying on of the eye frauds (R. 57-138). On or about Nov. 18, 1925, Nelson and Brown acting together in their fraudulent scheme, performed a fraudulent operation upon the eye of a Mr. William Wagner, near Vancouver, Washington (R. 56-57-68-69-72-73). For the operation two checks were given, one for $500.00 and one for $175.00, both drawn on banks at Vancouver, Washington (R. 57). Dr. Brown cashed the $175.00 check at a Vancouver bank and received the money therefor (R. 57). Nelson attempted to cash the $500.00 check at a Vancouver bank, but the bank refused to cash the check due to a supposed irregularity of the endorsement. The bank did, however, certify the check to its full amount "good when properly endorsed" (R.

84). The check was endorsed in blank and was freely negotiable (R. 57-186). Nelson turned the check over to Dr. Brown and did not see the check again until 1936 (R. 57). A few days later the check came back to the bank, bearing a second endorsement, "O. A. Plummer," the alias name under which Nelson was operating at that time (R. 69-158). The record does not show who sent the check in for collection (R. 84). In the interim Mr. Wagner had informed Mr. Dubois of the bank of the circumstances under which the check was given, and when the check came through for collection, it was stamped "payment stopped" and returned to the forwarding bank (R. 84). Mr. Stapleton, now Circuit Judge of Multnomah County, Oregon, and at that time an attorney practicing in Portland, then took the check personally to the Vancouver bank and demanded payment. Mr. Dubois of the bank understood that Judge Stapleton was representing the defendant in making the demand (R. 84-85). It does not appear whether the banker informed Judge Stapleton of the circumstances attending the Wagner transaction (R. 85). However, "after these men departed with the checks," Mr. Wagner came to Portland in an effort to locate the "eye doctors" and talked with Mr. Mazurosky, his endorsement having appeared at some juncture upon the $500.00 certified check (R. 70-186). In that conversation, Mr. Wagner told the defendant of the circumstances under which the check was given (R. 83). Then a few days after Mr. Dubois of the bank had talked

with Judge Stapleton about the check, the Judge brought the same to Vancouver and personally and voluntarily surrendered the check to the bank without payment. The check was never paid (R. 84-85). Nelson testified that subsequently the defendant was reimbursed for having cashed the $500.00 certified check; that "there was a thousand dollars given to Mazurosky"; and that when he "casually" asked the defendant in 1931 if it really cost a thousand dollars to "square" that check, the defendant replied, "Well, you still owe me money." That was the only conversation Nelson ever had with the dfendant about the check (R. 52-53), and that was six years after the transaction occurred (R. 56), and the only time Nelson had seen the defendant between the time of the Wagner transaction in 1925, and the time he came back to this part of the country (Portland) in 1931 (R. 52-56).

After Nelson and Brown departed with the checks (Nov., 1925), Henry Wagner started on their trail (R. 70). He first came to Portland to interview the defendant, and did interview him one time alone (R. 70), and a second time in company with a police officer, the witness Goltz (R. 73-74). On each occasion, the defendant gave Mr. Wagner and the officer a full account of the transaction in which he obtained the check; stated that the parties had bought $106.00 worth of merchandise and that he had given them the balance of the $500.00 certified check in cash; that he had

known one of the men for a number of years; that he didn't know where they were, but thought they were around Portland; that Plummer (Nelson) was a gambler and that he "made" the logging camps (R. 74). The defendant gave accurate descriptions of both men to the police and to Mr. Wagner (R. 70-74-75-69).

To develop the defendant's knowledge of the Wagner transaction, the following questions and answers were propounded to and given by the Witness Nelson:

"Mr. Dillard: Q. did you ever discuss this plan or means that you have described here of obtaining these checks from the Belters and the Wagners with Joe Mazurosky, or discuss it in his presence?

"A. I don't really think we ever did discuss it.

"I do not remember of having any conversation with him in that regard.

"Mr. Dillard: Q. I will ask you if either you or this man Brown that you refer to ever discussed this system of obtaining money from people which you have described you used in the Wagner instance. Did you ever discuss it in the presence of the defendant?

"A. No, sir, I don't think that I ever discussed it witht Mazurosky or with Brown before any of us together." (R. 58).

The foregoing completes the record of the Wagner transaction.

It is apparent from the record that when Nelson and Dr. Brown combined their talents in the prosecution of the eye fraud in 1925, Brown closed his optometry store, discontinued practice, and devoted his full time to a career of fraud and criminal adventure with Nelson. Nelson testified that at the time of the Wagner transaction, he left "that part of the country" (R. 52) and did not return until 1931 (R. 56). Nothing further is heard of Dr. Brown except that he died and Nelson buried him at Cincinnati, Ohio (R. 65). The date of Brown's death does not appear in the record.

Nelson continued in the practice of the eye frauds from 1925 until 1928 or 1929, at which time he entered the hotel business at Seattle, Washington. He engaged himself in this line of work for about a year (R. 62). The record does not show whether during this interim period between 1925 and 1928, he practiced the eye frauds by himself or in combination with others (R. 62). After discontinuing the hotel business around 1929, Nelson re-entered the "eye business." He was convicted "on this racket" in 1930 at Rockford, Illinois (R. 62). He also served time in a penitentiary in Wyoming on a felony charge, the time and period of his incarceration not appearing in the record (R. 63). Aside from these three interludes, i. e., the operation of the hotel for a year around 1929, the Rockford, Illinois, incident, and that which occurred in Wyoming, he was engaged in perpetration of the eye frauds (R.

62). He would occasionally take time off to do some gambling (R. 62).

After returning to the Northwest in 1931, Nelson saw the defendant at various times. On a number of occasions, he borrowed money from defendant, who in connection with his store, operated a pawn shop (R. 62). These loans were never in excess of $50.00 at a time (R. 60-64). In 1931, Nelson, the defendant and other un-named parties took a pleasure trip some place in Washington and stayed three or four days (R. 60-61).

On or about September 20, 1935, Nelson performed one of his fraudulent operations upon the eye of one Belter (R. 136-54). For the operation, he received $300.00 in cash and Mr. Belter's check for $500.00. This check (Exhibit 4) was sent by Nelson through the mail from Spokane, Washington, to the defendant at Portland. It was endorsed in blank by one Londergan, Nelson's partner, and did not bear Nelson's endorsement (R. 50-51). Nelson used his true name of Frank Nelson in transmitting the check to the defendant (R. 50-51). At the time the check was forwarded, Nelson owed the defendant twenty or twenty-five dollars (R. 51-64). The defendant cashed the check and Nelson testified that the proceeds, $400.00, were sent to him by the defendant about six weeks after the date appearing on the check. Nelson gave him $50.00

for cashing the check, paid him $30.00 interest that he owed him, and the remaining $20.00 deduction was for money borrowed from the defendant (R. 51).

"Mr. Dillard: Q. I will ask you, Mr. Nelson, if you ever had a conversation with Joe Mazurosky, the defendant, relative to the cashing of checks that might be sent to him by you?

"A. Well, I really couldn't say that I did have any understanding.

"Q. Did you ever talk with Joe Mazurosky, the defendant, about a commission for cashing this check or other checks of a similar character?

". . . Objection. A. Well, there was only one time to my knowledge; the defendant told me that ten (10%) per cent wasn't enough; he would have to have more money than that.

"Mr. Dillard: About when was that?

"A. That was in '35.

"Q. At that time did he say any more than that, that ten (10%) per cent wasn't enough.

". . . He just said that the checks were getting a little hot and he would have to have more commission." (R. 52)

On or about the 6th day of December, 1935, Nelson and Londergan performed one of the fraudulent operations upon the eye of E. C. Deibert, at Rockford, Washington. The check of Mr. Deibert in the sum of $300.00 was given in payment for the operation and

the check was sent by Nelson to the defendant at Portland (R. 59). Nelson testified that he heard nothing further about the check. Nelson was asked why he sent the Belter check and the Deibert check (Exhibit 26) to the defendant, and he testified: "Well, I knew that the checks were to be handled through him" (R. 59). Nelson, in these communications, used his true name (R. 60).

"Mr. Dillard: I will ask you (Nelson) if you ever had a conversation with Joe Mazurosky, we will say between the years of 1929 and 1935, concerning the means by which you made your livelihood, made your living?

"A. About the only thing that was ever said in regard to the business was, he asked me, 'How are the suckers, Slats? Are you making any big sales?' *That was the only conversation we had* (R. 60).

"He asked me that several times between 1929 and 1935" (R. 60).

On or about the 20th of December, 1935, the defendant was interviewed by two police officers, the witnesses O. A. Powell and W. E. Williams, in reference to the Deibert check, Exhibit 26. The defendant identified the party, J. C. Adams as Nelson; told the officers he did not know his correct name, but that he was commonly known as "Slats" and that he had worked with Dr. Brown about 16 years ago in the eye specialist bunk as far as he knew. The witness Powell couldn't

recall whether the defendant told him he received the check personally or through the mail. The witness Williams testified that the defendant told him and Officer Powell that Nelson had brought the check in to have it cashed; that the defendant refused to cash it; he said he would put it through the bank and he (the defendant) didn't know whether it was any good until the officers told him it had come back (R. 80). Nelson, on the other hand, testified that he had sent the check to the defendant from Spokane, Washington (R. 59).

Testimony relating to the conspiracy charged in count VII of the indictment:

The witness John M. Gray testified that he was engaged in the eye frauds, and that he first entered the business in 1930. Prior to that time he had been a practicing optometrist for many years (R. 97). At the time of the trial, he was an inmate of the Texas penitentiary under sentence of 43 years for various crimes including assault and attempt to murder, grand theft, and an eye fraud charge in Norfolk, Virginia, to which he pleaded guilty (R. 96). The witness operated in the eye frauds between 1930 and 1935, and defrauded about 1,000 people during that period (R. 97-98). The witness first met the defendant in November, 1935; was casually introduced to him, and had no conversation with him (R. 86-93).

On or about October 29, 1934, Gray, in conjunction with one T. A. Andrews, imposed the fraudulent eye

treatment on one Mrs. Mershon in the vicinity of Arlington, Washington (R. 86). For this service, they received the check of Mrs. Mershon in the sum of $450.00 (R. 134). Gray took the check to Seattle, Washington, and delivered it to one Roy Martin, another confederate in this particular scheme (R. 86). The witness didn't know personally what Martin did with the check, but Martin told him that he mailed the check to the defendant (R. 90). Martin also told Gray that it would cost him (Gray) 15% to get the check cashed through the defendant. Subsequently, by pre-arrangement with Roy Martin, Gray went in company with Mrs. Roy Martin to the store of the defendant in Portland, Oregon, and received the proceeds from the Mershon check. Gray testified that the 15% was deducted for cashing the check (R. 86-87). The witness was not sure it was the defendant who delivered the money, but from his location outside the store of the defendant, the party looked to be about Mr. Mazurosky's height. He would not swear it was the defendant whom he saw in the store (R. 88).

The witness Horack, Portland City Police, testified that "around December 18, 1934" he had interviewed the defendant at his store in Portland and talked with him about the Mershon check, Exhibit 1. Mr. Mazurosky identified his signature and stated that he had cashed the check. The officer told the defendant that the check had been obtained in a "bunco game," and

the defendant told the officer he did not know how the check was obtained; that he did not know the whereabouts of the party ho gave him the check; that the party was a doctor. The witness stated that the details of the matter were hazy in his recollection; that on the previous trial he "might" have testified that he didn't ask the defendant anything about who the parties were from whom he (the defendant) obtained the check (R. 104-105).

The witness Eichenberger, Portland City Police, testified that he interviewed the defendant in December, 1934, in company with officer Horack, concerning the check, Exhibit 1; that the defendant told them that he had cashed the check at the Bank of California; that the check had been given him for the purchase of some goods; that he had cashed the check and delivered the balance of the money to the party (R. 106).

On or about September 13, 1934, Gray and his associate, Andrews, perpetrated the eye fraud on one Allen in the vicinity of Boulder, Colorado (R. 93). In payment for the operation, a cashier's check drawn upon the Mercantile Bank and Trust Co. of Boulder, Colorado, in the sum of $500.00 was given Gray.

After receiving the check, Gray gave the check to Martin, who told him he could get the check cashed by sending it to the defendant at Portland and that it would cost 15% to have the check cashed. Martin told

Gray he was going to send the check to the defendant and did mail it to the defendant from Denver, Colorado. Later, Martin gave Gray $425.00, the proceeds from the check (R. 94-95).

Gray testified that Martin and another associate, Crangle, are at this time in the penitentiary at Atlanta, Georgia; that T. A. Andrews is an inmate of a Federal penitentiary in Virginia (R. 92).

ARGUMENT

I

ASSIGNMENT OF ERROR No. I

"The Court erred in over-ruling defendant's motion for a directed verdict as to Counts 4, 7 and 8 of the indictment made at the conclusion of the case after all parties had rested, for the reasons therein set forth:

Mr. Biggs: "The Government having rested and the defendant at this time resting, moves the Court for its order directing a verdict of not guilty as to each of the counts in the indictment, on the ground and for the reason that there is no substantial evidence sufficient to submit to the jury which establishes or tends to establish the connection of the defendant with any scheme or artifice to defraud, or the particular scheme or artifice to defraud described and set forth in each

count of the indictment, or the use of the mails pursuant to said scheme, there being no conscious participation of the defendant in such scheme. With respect to the count of the indictment relating to the defendant's alleged connection with Roy Martin, John Gray, and others, for the further reason that there is no testimony whatsoever connecting the defendant with any criminal device, scheme, intent, or plan on their part, all of the testimony admitted being the testimony of acts or declarations of alleged co-conspirators, and there is an inadeuate prima facie showing of a conspiracy.

"The Court: Which count is that, now?

"Mr. Biggs: That is Count 1 of the indictment,Your Honor, and also Count 7 of the indictment, being the conspiracy count, and for the further ground that there is no substantial evidence that the United States mails were used by the defendant voluntarily or involuntarily or at all in connection with this."

Thereupon the following proceedings were had:

"The Court: The Court at this time denies the motion for a directed verdict as to Counts 1, 2, 3, 5 and 6.

"Mr. Biggs: And may we have an exception to the Court's ruling as to Counts 4,7 and 8 of the indictment?

"The Court: Yes" (R. 181-182).

This assignment raises the question whether there was any substantial evidence sufficient to warrant sub-

mission to the jury of Counts numbered 4, 7 and 8. Three distinct and severable lines of testimony were offered by the government in support of each count, respectively, and the argument will be directed to each count in chronological sequence.

COUNT IV

INTENT AND KNOWLEDGE

Proof of intent and knowledge on the part of defendant, as respects this count is closely identified with the same question applying to Count 8. Discussion of this element of the testimony will therefore be deferred for treatment in the argument under the same sub-head under said Count 8, beginning at p. 55 of this brief.

PERTINENT FACTS AND DISCUSSION

Attention is directed to the proof proffered by the United States in support of Count 4 of the indictment. The Court held that there was no sufficient evidence of mailing of the Belter check (Exhibit 4) by the Bank of California (R. 160), but the record does show that the defendant deposited the check with the Bank of California, at Portland, Oregon, for collection and that it was transmitted to the First National Bank of Kennewick, Kennewick, Washington. Upon receiving the item for collection, the Kennewick Bank debited the account of the drawer of the check, Mr. Belter, and thereupon forwarded to the Bank of California at

Portland its own draft drawn upon the First National Bank of Portland, to the favor of the Bank of California, in payment of the check. Adequate proof was offered to show that the draft was transmitted by the use of the United States mails (R. 117). No evidence whatsoever was offered to show the custom of the banks in the payment by the collecting bank of items sent by the forwarding bank for collection. There is not so much as a suggestion in the record that it was the custom and/or ordinary course of business for the collecting bank to remit and pay by means of its own draft.

The subdivision of the statute, Sec. 338 of Title 18, U. S. C. A., under which this count of the indictment was drawn provides: "Whoever shall *knowingly* cause to be delivered by mail . . . any such letter, etc., for the purpose of executing such scheme, shall be fined, etc. It is assumed from the line of proof received in an attempt to establish liability on this count of the indictment that the Government relied upon the rule enunciated in the cases of *Spear vs. U. S.,* (CCA 8th, 1917) 240 F. 250, cert. denied (1918), 246 U. S. 667, 38 Sup. Ct. 335, 62 L. Ed. 929; *Savage vs. U. S.,* (CCA 8th, 1920) 270 Fed. 14, cert. denied (1921) 257 U. S. 642, 42 Sup. Ct. 52, 66 L. Ed. 412. The rule of these cases is that liability may attach even when the actual mailing has been done by a person entirely independent of the defendant's control, this presumably upon a fictitious agency theory. A second theory found in the

cases as a basis for liability under the statute, is found in the rule that if the transmission of the item through the mails was the natural and reasonable consequence to be anticipated by the parties, this shall satisfy the provision requiring that the party shall "knowingly" cause the item to be mailed. *Shea vs. U. S.,* 251 Fed. 440; cert. denied 248 U. S. 581, 39 Sup. Ct., 132, 63 L. Ed. 431.

It is of course true that when a party deposits a check with a bank for collection upon an out-of-town bank, he may reasonably anticipate that the check will be forwarded through the mails in the process of making the collection. Any one at all cognizant with banking practice knows that the original check must find its way to the drawee bank. The bank becomes the depositor's agent in so forwarding the check. *Spear vs. U. S.,* supra. But the foregoing rule is without application to the facts offered in support of Count 4 of the indictment. The proof shows that the First National Bank of Kennewick, the bank on which the check was drawn, cashed the check, that is, debited the account of the drawer and charged itself with the amount of the collection (R. 118). It thereafter forwarded its own draft drawn to the favor of the Bank of California, in payment of the collection item (R. 117).

We proceed now to an analysis of the facts and the rules of law pertinent thereto to determine whether

the evidence in the case establishes liability under either one of the theories of liability suggested in the cases which have construed the statute, and to which reference is made, supra.

The First National Bank of Kennewick was not acting as the agent of the defendant or of the Bank of California in transmitting its draft to the Bank of California, in payment of the check after collection thereof:

The relation between the forwarding bank (Bank of California) and the collecting bank (First National Bank of Kennewick) was that of principal and agent until the agent had completed the business of collection. Upon debiting the account of the drawer of the check, the First National Bank of Kennewick became the debtor of the Bank of California, and the agency relation ceased. One duty (the duty to collect) came to an end, and another (the duty to remit) arose in its place. Mr. Justice Cardoza in *Jennings et al. vs. United States Fidelity & Guaranty Co.,* 294 U. S. 216, 55 Sup. Ct. Rep. 394, 79 L. Ed. 869 (1935). In the foregoing case the learned justice cites numerous cases which serve to dissipate any possible theory of agency pertaining after the collection has been effected and the money received by the bank which has made the collection, i. e., the drawee or collecting bank. The collected funds were "mingled" with the funds of the collecting bank and the agency relation theretofore existing, gave way to the normal debtor and creditor relation. The

legal and factual status of the defendant is thus clearly distinguishable from that exhibited in the line of cases above adverted to, which are usually cited as the leading cases on this particular phase of the problem.

It should be observed that under the cases where liability has been imposed for sending or causing a check to be sent through the mails by a bank, the facts have invariably disclosed that the check was forwarded *for collection,* thereby uniting the defendant in the case as principal with the forwarding bank as agent. Where the check is not placed with the bank for collection, but, rather, is cashed by the bank and credit given, the relation of principal and agent would not come into being. The bank would thereby receive title to the check and its act in forwarding the same through the mails to the drawee bank would not in any sense be deemed one directed to the execution of a fraudulent scheme. *Douglas vs. Fed. Res. Bank,* 271 U. S. 489, 492, 46 Sup. Ct. 554, 556, 70 L. Ed. 1051. *Newland vs. First National Bank of Kansis City,* (CCA 8) 64 Fed. (2) 399, 402. The relation between the depositor of the check and the bank would simply be that of debtor and creditor and the act of forwarding of the check would be an independent banking transaction. Correlatively, when the agency is cut off by the collecting bank's receipt of the funds in payment of the check, its act in making payment to the forwarding bank by means of its own draft is an independent banking trasaction between the col-

lecting bank as debtor and the forwarding bank as creditor. *Jennings et al vs. United States Fidelity & Guaranty Co.*, supra.

In concluding, attention is directed to the case of *Spillers vs. U. S.*, 47 Fed. (2) 893 (CCA 5). The testimony showed that the defendant had sent five checks to a Mrs. Oliver at Weatherford, Texas. Her daughter received them and deposited them in the bank, which bank in turn sent them to another bank in another city. A witness testified that in the usual course of business the checks would be sent by mail. Additional facts are found in the decision of the court:

> "It was not shown that the bank was the agent of the appellant or had any dealings with him . . .
>
> "No doubt the statute is to be broadly interpreted to effect the intent of Congress. The general rule may be deduced from the reported cases that whenever a person puts in motion a train of circumstances that *will inevitably cause the mailing of a letter as a necessary step in a fraudulent scheme,* he may be found guilty of causing the letter to be mailed on sufficient proof of knowledge and intent. . . . *However, it is not every incidental use of the mail that occurs as a result of the scheme that would constitute a violation of the law. The letter must be knowingly mailed or be caused to be mailed in furtherance of the scheme by the defendant.*"
>
> "*On the undisputed facts in the record there is nothing to show that appellant knew, or had any reason to know, or intended that any of the parties to whom checks were sent would deposit them in*

banks which would in turn mail them to Fort Worth or Dallas for collection or that he in any way induced the deposits."

The foregoing case is cited at this stage of the argument on the proposition that the courts require the establishment of the relation of agency where a defendant is sought to be charged for having caused banks to handle checks received as the fruits of a fraudulent scheme. The case is to be considered in conjunction with the decisions already cited which impose liability where the bank is made the agent by receiving a check for collection. We proceed now to point out that there is nothing in the record to show that appellant knew, or had any reason to know, or intended that the Bank of Kennewick should send its draft through the mails, thereby to render him liable on this count of the indictment.....

The transmission through the mail of the draft, Exhibit 11, was not the natural and reasonable consequence to be anticipated by the defendant in the collection of the check, Exhibit 4, and the Defendant did not therefore "knowingly" or at all cause the mails to be used.

We are confronted at the outset with the proposition, already mentioned, that there is a total absence of any evidence showing that it was the custom, practice and ordinary course of business for the First National Bank of Kennewick or for any other bank to remit collected items by its own draft. Moreover, there is no evidence or suggestion in the record of knowledge

possessed by the defendant as to the customs and practices of banks in the handling of such items beyond the fact the defendant did keep a bank account and did avail himself of the ordinary banking facilities.

Counsel for the government and the court apparently assumed that the same course of practice was indulged by banks in the remitting of funds collected on a forwarded item, as in the case of an original check forwarded for collection. This is far from the fact and the rule has long been settled, both in the state and the Federal courts, that the two phases of the transaction, i. e., the forwarding for collection and the remitting of the funds collected rest upon different considerations of fact and law.

A precise statement of the rule to which reference is made is found in the case of *Federal Reserve Bank of Richmond vs. Malloy et al.,* 264 U. S. 160, 44 Sup. Ct. Rep. 296, 68 L. Ed. 617. Under the facts of that case, a check was sent for collection to the bank upon which the check was drawn. The collecting bank charged the account of the drawer of the check and stamped the check "paid" and on the same day of receipt of the item, transmitted its draft drawn upon another bank in payment of the collection. The question was whether the collecting bank had the right as a matter of law and under prevailing custom and practice to remit by forwording its own draft rather than the actual money called for by the terms of the check. The collecting

bank's draft was not honored, and the question of the right of the collecting bank to remit by its own draft was squarely presented. Further facts are noted in the extracts from the opinion of Mr. Justice Sutherland. The Court held:

"It is settled law that a collecting agent is without authority to accept for the debt of his principal anything but 'that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par.' *Ward vs. Smith,* 7 Wall. 447, 452 (19 L. Ed. 207). The rule applies to a bank receiving commercial paper for collection.

"(Citing cases.) It is unnecessary to cite other decisions, since they are all practically uniform. *Anderson vs. Gill,* supra, presented a situation practically the same as the one we are here dealing with, and the Supreme Court of Maryland, in disposing of it, said:

" 'Now, a check on a bank or banker is payable in money, and in nothing else. Morse, Banks & Banking (2nd Ed.) p. 268. The drawer, having funds to his credit with the drawee, has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should upon presentation, instead of requiring the cash to be paid, accept at the drawer's risk, a check of the drawee upon some other bank or banker.' . . .

"Finally, it is urged that the acceptance of the drawee's own draft, instead of money, was justified by custom. The testimony relied upon to establish the custom follows:

" 'The business of check collecting is handled by the Federal Reserve Bank in a way very similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank on which they are drawn or to some other bank in that city, and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers, and to remit by means of its exchange draft or by a shipment of currency.'

"It thus appears that the custom, if otherwise established, does not fix a definite and uniform method of remittance. When checks are sent for collection and return, the bank is expected to cancel the checks, and charge them to the account of the drawers, and remit 'by means of its exchange draft or by a shipment of currency,' the former being used more frequently than the latter. Whether the choice of methods is at the election of the drawee bank or the collecting bank does not appear. If it be the latter, it would seem to result that the election to have remittance by draft instead of currency, being wholly a matter of its discretion, or even of its caprice, as to which the owners are not consulted, would be at its peril, rather than at the risk of the owners of the check.

"*But the proof shows that the alleged custom was not known to plaintiffs, and they could not be held to it without such knowledge,* because, all other reasons aside, by its uncertainty and lack of uniformity, it furnishes no definite standard by which the terms of the implied consent sought to be

established thereby can be determined. It furnishes no rule by which it can be ascertained when an exchange draft shall be remitted and when currency shall be required, or who is to exercise the right of election. . . .

"*A custom to do a thing in either one or the other of two modes, as the person relying upon it may choose, can furnish no basis for an implication that the person sought to be bound by it had in mind one mode rather than the other.*

"It is said, however, that there is a custom among banks to settle among themselves by means of drafts, so well established and notorious that judicial notice of it may be taken. But the usage here invoked is not that, but is one of special application to a case where the collection of a check is intrusted to the very bank upon which the check is drawn and where payment is accepted in a medium which the contract, read in the light of the law, forbids. The special situation with which we are dealing is controlled by a definite rule of law which it is sought to upset by a custom to the contrary effect . . ." (Italics ours.)

The law of the State of Washington is to the same effect. In *First National Bank vs. Comm. Bank & Trust Co.,* 242 Pac. 356, 358, 137 Wash. 355, it was held that in the absence of custom or agreement, a collecting bank is without authority to accept for the debt of its principal anything but that which the law declares to be legal tender.

The Supreme Court of Oregon held to the same effect in *Loland vs. Nelson,* 139 Ore. 581, 585, 8 Pac. (2) 82:

> "The acceptance by the Federal Reserve Bank, Portland Branch, of a draft upon the Bank of California, instead of demanding and collecting the money due on said check, *was in no sense the act of defendants Jenning, nor should they be chargeable therewith.*"

An interesting case on the same point is *Farmers Bank and Trust Co. vs. Newland,* 31 S. W. 38,39, 97 Ky. 464, wherein the Court held:

> "Since the paying bank's draft may not under the rule be accepted by a collecting bank, the only course remaining is to send an agent to the point of collection or to have the bank or agent at that point *send the actual money by express or other means of transportation.*"

Though there is no evidence in the record that it is customary to forward money or currency by express, and not through the mails, the Court is asked to take judicial notice of that fact. The phrase "shipment of currency" referred to in the Malloy case, supra, quite obviously did not refer to a transfer of the money by use of the mails. For other cases see *Marshall vs. Wells,* 73 Am. Dec. 381; *Rainwater vs. Federal Reserve Bank of St. Louis,* 290 S. W. 69, 172 Ark. 631.

With the foregoing rules of decision in mind, it may not be successfully contended that the forwarding of the draft by the First National Bank of Kennewick

to the Bank of California, at Portland, was a reasonable consequence to be anticipated by the Defendant, upon his deposit of Exhibit 4 with the Bank of California for collection. *There is not a scintilla of evidence in the record showing what the custom of the respective banks was in the remitting of funds collected on checks forwarded to the drawee bank.* No special contract or even the basis for an implied understanding between the banks defining the terms of the remittance is shown. In the absence of a special agreement, or of custom of universal application shown to have been known to the defendant, he would naturally assume as this Court would that the Kennewick bank would act within the bounds of its legal authority and remit in the specific medium called for by the terms of the check, to-wit: *Five Hundred Dollars,* and not by means of its own draft. *Fed. Reserve Bank vs. Malloy,* supra.

If counsel for the Government should have sought to offer proof on the subject of the customs and practices of banks in remitting funds collected on checks forwarded for collection by draft, grave difficulty would be encountered in supplying the necessary proof. The Federal Reserve System has as one of its essential functions, a means of clearing checks without an interchange of communication by mail between corresponding banks. The teletype, the radio, and the telegraph companies all play stellar roles in the banking drama as it is enacted daily in the banks of this country, both large and small. The First National Bank of Kenne-

wick is not a "distant" bank within the perview of the decisions. It is within the immediate trading area of Portland, Oregon, in the Columbia Basin, and maintains its correspondent bank in Portland (R. 116).

In considering this phase of the question, the language of Judge Chase, found in the case of *United States vs. Baker et al.,* 50 Fed. (2) 122, (CCA 2), is peculiarly appropriate:

> "Since proof of the mailing of one of these letters was the sine qua non of the crime charged, it is necessary to look closely to this question upon which so much depends to determine whether it supplied the requisite proof. Of course, the necessary proof may be furnished by circumstantial evidence alone. *Freeman et al. vs. United States,* supra, and cases cited. But the circumstances proved must exclude all reasonable doubt.

The presumption, under the facts appearing in the record, is that the defendant intended the remittance of the funds collected on the Belter check, Exhibit 4, to be made without use of the United States Mails.

The remittance of the funds collected upon the check, Exhibit 4, might have been made in the reasonable anticipation of the defendant, in a number of ways without resort to use of the mails. The record is devoid of any evidence showing the customs and practices of the banks in the mode or formulae customarily adopted by them in making such remittances. There is an absence of any evidence showing knowledge on the part

of the defendant of any such customs and/or practices, if they do exist. Where it is shown that an act may be performed in one of two ways, one of which involves violation of a penal statute, and the other does not come within the interdiction of the statute, the presumption is that the defendant intended the act to be performed in an alternative manner which would not involve violation of the statute. Underhill on Criminal Evidence, Ed. 1935, p. 52, contains expression of the rule in the following language:

> "Where there are two conclusions reasonably possible, one compatible with innocence, and the other with guilt, the presumption of innocence must prevail."

The rule is aptly phrased in the case of *Willsman vs. United States,* 286 Fed. 852, 856 (CCC 8):

> "Evidence of the facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." See cases cited in the decision, and see also *Terry vs. United States,* 7 Fed. (2) 28, 31 (CCC 9).

In *Dalton vs. U. S.,* 154 Fed. 461 (CCA 7), the accused was a party to a fraudulent scheme in which he and his confederates used the express and the telegraph

companies in its execution. Subsequently certain of the conspirators began use of the U. S. Mails, but it was not shown that the accused participated in the scheme after the use of the mails was adopted as an aid in furthering the scheme. Counsel for the Government sought to invoke "an inference or presumption of continuance arising from the facts and circumstances proven," but the court rejected the argument, and held:

> "Under the established rule of our criminal law, however, as well defined in *Coffin vs. United States,* 156 U. S. 432, 458, 15 Sup. Ct. 394, 39 L. Ed. 481, the 'presumption of innocence is an instrument of proof created by the law in favor of the accused,' *and the presumption that the accused would not remain in the concern when it turned into a criminal course (criminal under the Federal Statute) would set aside or overcome the assumed inference of fact relied upon.*"

The court in the above case also observed (pp. 462, 463):

> "Moreover, while several witnesses state conversations with the plaintiff in error to arrange for transmissions of the (so-called) literature by express in 1903 and 1904, the record is without proof . . . of facts to charge the plaintiff in error with purpose at such times to use the mails in execution of the scheme."

The case of *Coffin vs. U. S.,* cited in the Dalton case, supra, appears to be the leading case defining the full limits of the application by Federal Courts of the presumption of innocence. The Court goes further than

to consider this rule as a presumption under the usual definition of the term, but defines it rather as an "instrument of evidence," operable at all times in a criminal case in favor of the accused.

It is respectfully submitted that there is an absence of any testimony in the record sufficient to warrant consideration by the jury of Count 4 of the indictment.

COUNTS VII AND VIII

Both of the foregoing counts are predicated upon an identical theory and most of the legal propositions applicable to one will apply with like effect to the other. Since each count embraces a distinct and separate conspiracy, complete in itself under the theory of the prosecution, the facts offered to support one conspiracy count will be without relevancy to sustain the other. The testimony received in respect to Count 7 is summarized bginning at page 18 of this brief. The remainder of the testimony as summarized herein, was directed to the proof Count VIII.

Among other things, the prosecution carried the burden of proving (a) that a conspiracy existed as charged in each count of the indictment; (b) that the defendant was one of the conspirators, and (c) that it was a part of the agreement comprising the conspiracy that the U. S. Mails should be used in executing it.

INTENT TO USE THE MAILS

There is no substantial evidence to show that it was a part of the agreement comprising the conspiracy that the United States Mails should be used in executing it.

This point applies to both conspiracy counts. The methods of approach of each group of conspirators were similar in character. Without exception, and so far as the record shows, in each of the thousands of frauds perpetrated, the conspirators would personally call upon the victim, would personally persuade the victim, perform the fraudulent operation, and thereupon personally receive the check or the cash in payment therefor. The witness Gray testified that between 1930 and 1935, he and his confederates imposed the fraudulent scheme upon about one thousand people. (R. 97-98) If Nelson was as active in his conspiracy, as Gray was in his, Nelson and his group imposed the fraud upon approximately two thousand people during the entire period of his engagement in it. From the record, it appears that only on two occasions did Nelson use the mails in alleged furtherance of the scheme and that was only after an attempt had been made in each instance to personally cash each of the checks at the banks or in the neighborhood where the respective checks were received. Such was the invariable practice. An identical course was pursued by Gray, and out of the approximate number of 1000 frauds perpetrated by his group, there were but two occasions in which the mails were used as shown by the record.

It is significant that though Gray, heading one of the conspiracies and Nelson, heading the other, both testified apparently without reservation and freely discussed all the details relating to the respective conspiracies, and neither of them testified that it was a part of the scheme that the mails should be used. This is a circumstance heretofore recognized by this court to be of controlling importance. *Kuhn vs. United States,* 26 F. (2d) 463 (CCA 9).

With the foregoing facts in mind, attention is directed to the case of *Farmer vs. United States,* 223 Fed. 903 (CCA 2), cert. denied 238 U. S. 638, 59 L. Ed. 1500, 35 S. C. 940. The facts upon which the ruling was based may be substantially inferred from the language of the court, as follows:

> "Count 1 charged a conspiracy (section 37) to commit a violation of that section (215). Under the first count, therefore, the government had to sustain a heavier burden of proof as to the intent of the conspirators than under the other two. Under 215 it is sufficient to show an intent on the part of the deviser or devisers of the scheme to defraud some one; it is no longer necessary to show an intent to use the mails to effect the scheme, as it was under section 5480, U. S. Rev. Stat. The deviser of the scheme may, at the time he planned it, have intended to avoid all use of the mails in carrying it out; nevertheless if, in carrying it out, he does use the mails, the offense is committed. There are two elements of the crime, a scheme intended to defraud and an actual use of the mails; both, of course, must be proved to warrant conviction. When, however, the charge is conspiracy to commit

the offense specified in section 215, it is necessary to prove an intent, not only to defraud, *but also to defraud by the use of the mails.* The draftsman of the indictment fully appreciated this; the first count charges an intent to use the mails as well as an intent to defraud.

"Upon a careful examination of the record we are satisfied that the government failed to prove an intent by the conspirators named in the first count to use the mails to effect the scheme. Direct evidence of intent is rarely available; it may be shown by circumstances. Usually when the scheme is unfolded it is apparent that it could not be carried out without using the mails, and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails. We do not find in this record sufficient to warrant the inference that on January 2, 1910, when the conspiracy was formed, the conspirators intended to use the mails. The scheme revealed is markedly different from others which have been before the courts (mainly under old section 5480), where it was evident that the scheme could not be successfully carried out without using the mails. Thus in the old 'green goods game,' *no personal interview could be risked* until, after an exchange of letters, it appeared that some individual was a person who might be safely trapped. When the scheme is to dispose of stock at inflated prices, advertisements have to be published *calculated to bring inquiries by mail from many different places;* in that only can a sufficiently broad field be found for the dissemination of the securities. *But in this scheme different tactics are required.* Advertising in the hope of bringing response from persons eager to pay $10,000 or $25,000 or $50,000 for a few books would be a waste of money. The only practical method is to find out *by inquiry* the names of persons likely to be fooled,

and then *to have them interviewed by one or more glib talkers and thus persuade them to buy through ingenious representations* and the exhibition of letters, telegrams, newspaper clippings, samples, etc. When books in sets are bought, presumably they are sent by express, and *the person who effected the sale personally takes the check that pays for them.* Since inference is not enough to make out full intent under Count 1, and there is no direct evidence of it, *we think conviction under this count should be reversed.*"

In *Schwartzberg vs. United States,* 241 Fed. 348 (C. C. A. 2), the general nature of the charge contained in the count for conspiracy and the numerous counts for the substantive offense was that one Bamberger (a defendant) during several years represented himself to the persons and corporations to be defrauded as a skillful salesman or a person able to procure business, and having by such representations obtained some business connection with said persons, he recommended as good customers the other defendants. Thereupon Bamberger's victims sold on credit to the other defendants; both they and Bamberger making, when it was thought advantageous, false representations as to their financial position and honest intent. For the goods sold, payment was substantially never made. The court, in holding that the evidence did not warrant conviction on the conspiracy count, at page 353, said:

It is substantially admitted that an inspection of the record does not justify the finding necessary to sustain the conspiracy count, viz., that there was

an intent on the part of the conspirators to use the mails in the execution of the scheme. *Farmer vs. U. S.*, 223 Fed. 903, 139 C. C. A. 341. *While the mail was used quite extensively, and in execution of the fraud, the reliance of defendants, when some certainly conspired to defraud, was upon Bamberger's quick tongue and fertility in falsehood.* The intent which we held necessary in the Farmer case was naturally not proven by direct evidence, and could not be inferred beyond a reasonable doubt.

"The judgment on the conspiracy count is reversed."

A comparison of the facts of the Farmer case, supra, with those offered by the Government in support of each of the conspiracy counts, will reveal a striking similarity, if not indeed, a substantial identity. The Farmer case presents the settled law on this particular phase of the question. It has been cited and approved by this court. *Stubbs vs. United States*, (C. C. A. 9) 249 Fed. 571.

Judge Morrow, speaking for this circuit in *McKelvey vs. United States*, 241 Fed. 801, in sustaining the sufficiency of an indictment emphasized that "the use of the mails and post office establishment formed a part of, and was the essential fact of, the conspiracy to commit an offense against the United States." See also *Morris vs. United States*, 7 Fed. (2d) 785, (C. C. A. 8) to the same effect.

Section 5480 of the Rev. St., which was in effect prior to the adoption of the Penal Code, prohibited the

mailing of a letter in the execution or attempted execution of a scheme to defraud. This section required that there must not only be a scheme to defraud, but that the scheme must contemplate the use of the United States post office establishment. The present statute, does not require that it be shown that there was an intent to use the post office establishment. It is sufficient if the said establishment is used. However, in order to prove conspiracy to use the mails to defraud it is necessary, as shown above, to establish that it was an essential part of said conspiracy to use the mails to defraud. Hence the decisions construing the effect of the provisions of said section 5480 are applicable to charges of conspiracy at the present time.

In *Brooks vs. United States,* 146 Fed. 223 (C. C. A. 8), Syll. 1, it was held:

> "In order to make out the offense defined by Rev. St., Sec. 5480 (U. S. Comp. St. 1901, p. 3696), prohibiting the mailing of a letter in the execution or attempted execution of a scheme to defraud, there must not only be a scheme intended to defraud, but such scheme must contemplate *as one of its essential parts the use of the United States post office establishment* to effect its purpose, the gist of the offense being the mailing of the letter in furtherance of *such a scheme.*"

Again in *United States vs. McCrary,* 175 Fed. 802, Syll. 1, it was held:

> "To constitute the offense of 'using the mails to effectuate a scheme to defraud,' within Rev. St., Sec. 5480 (U. S. Comp. St. 1901, p. 3696), the scheme must have been one which contemplated the use of the post office establishment to effectuate it, and *it is not sufficient that the mails were used as a mere incident to some fraudulent scheme.*"

It is submitted upon the basis of the authorities cited, that there is no substantial evidence to show that it was a part of the plan and scheme of the conspiracies set forth in Counts numbered 7 and 8 of the indictment that the United States mails should be used in the execution thereof.

PROOF OF DEFENDANTS PARTICIPATION AS A MEMBER OF THE CONSPIRACIES CHARGED

Pertinent Facts Relating to Count VII:

The facts relating to this count are summarized beginning at page 18 of this brief.

It may be admitted at the outset that a conspiracy existed between Gray, Martin et al., for the purposes set forth in the indictment; also that an overt act was committed sufficient to support the charge. The failure

of proof is found in the absence of any substantial evidence to show that the defendant was one of the conspirators.

The only one of the parties to this conspiracy who testified was the witness, Gray. He did not testify that the defendant was a party nor did he give any testimony from which it might reasonably have been inferred that the defendant was so associated. The witness Gray did not meet the defendant until a week or ten days after consummation of the last transaction mentioned in the indictment. It was shown that Martin and the defendant knew each other and that Martin knew the defendant would cash checks sent to him upon a discount basis of fifteen per cent; that Martin sent the defendant two checks (Mershon and Allen) obtained pursuant to the fraudulent scheme, and that the defendant cashed these checks and retained 15 per cent of the amount of each check for this service. In cashing the checks the defendant endorsed them in his true name and deposited them with his own bank. One of these checks was a cashier's check (R. 135). The circumstances attending the cashing of the checks by the defendant were regular. No inference adverse to the defendant may b drawn from the fact that he discounted the checks in cashing them. The court will take judicial notice of customary business practices. The profit obtained upon discount of commercial paper is a legitimate profit and these transactions as shown by the

record were simply that. The defendant was in the business of operating a loan-office and pawn shop. It was to be expected that in the absence of knowledge of the fraud, he would cash the checks and take a profit for doing so.

The officer Horack testified that "around December 18, 1934," he interviewed the defendant concerning the Mershon check, Exhibit 1, and told the defendant at that time that the check was received in a "bunco game," and the defendant told the officer he did not know how the check was obtained. After receiving the information from the officer that the Mershon check was received in a "bunco game," it does not appear that the defendant handled any more checks for the Martin-Gray gang of conspirators.

There is an absence of any testimony to show that either Gray or Martin told the defendant about the fraudulent scheme. There is nothing to show that Martin was not engaged at the same time in legitimate enterprises. There is not a syllable of testimony showing or even indicating that the defendant knew or had any basis for knowing that the particular checks (Mershon and Allen) were obtained pursuant to execution of the fraudulent scheme.

Counsel for the government will doubtless concede that the evidence offered by the United States was purely circumstantial. No witness testified that the

defendant was one of the group. Defendant's only connection with either of the transactions set forth in this count of the indictment was through Roy Martin who told the witness Gray that the defendant would cash the checks upon a discount basis of fifteen per cent.

In evaluating the evidential credence to be given circumstantial evidence, resort must be had to certain elemental rules of law to which reference will now be made.

The evidence received in support of Count VII of the indictment is consistent with the innocence of the accused, and upon a record showing such to be the fact, the conviction will be set aside.

The rule is established without exception in the Federal courts that facts which merely give rise to a reasonable and just inference of the guilt of the accused, are insufficient to warrant a conviction. To warrant a verdict of guilty, the evidence must be of such character as to exclude every reasonable hypotheses but that of guilt of the offense imputed to the defendant. The facts must be consistent with his guilt only, and inconsistent with his innocence. *Terry vs. U. S.,* (C. C. A. 9) 7 Fed. (2) 28, 31. *Whenever a circumstance, relied upon as evidence of criminal guilt* is susceptible of two inferences, one of which is in favor of innocence, *such circumstanc is robbed of all probative value, even though, from the other inference, guilt may be fairly deductible. Turinetti vs. U. S.,* 2 Fed. (2) 15 (C. C. A. 8): *Vernon vs. U. S.,* 146 Fed. 121, 123 (8th).

Without proof that the defendant knew that the checks were obtained pursuant to the fraudulent scheme alleged in Count 7, and without proof that the defendant knew that it was an essential part of the structure of said conspiracy that the mails should be used, it is difficult to determine a theory upon which the government can hope to suggest an hypothesis of guilt, to say nothing of any number of hypotheses of innocence apparent upon the face of the record. The presumption is that the defendant did not know of the fraudulent scheme, and that everything he did was in good faith. *Coffin vs. U. S.,* 156 U. S. 432, 458, 460, 15 Sup. Ct. 394, 39 L. Ed. 481.

If it should be stated that the practice of discounting checks, in itself contains basis for an inference of guilt, the question is immediately presented, guilt of what? The defendant was not indicted for any irregularity in the cashing of checks. He is charged simply as a conspirator, and as a party to a fraudulent scheme. Proof that the defendant was guilty of irregular conduct or of acts directed to some unlawful end is not sufficient. The proof must establish that the acts of the defendant were directed to the accomplishment of the particular fraud alleged in Count 7 of the indictment. *Lonabaugh vs. U. S.,* 179 Fed. 476 (C. C. A. 8).

Attention is now directed to a series of cases which, it is submitted, correctly apply the rules to which reference has been made.

A leading case, and one frequently cited, is *Stubbs vs. United States,* (C. C. A. 9th) 249 Fed. 571. The rule enunciated in that case is more precisely stated in the cases about to be discussed. The assumption is that the court will want to study the case in all its multiple ramifications.

In *Linde vs. U. S.,* 13 Fed. (2d) 59 (C. C. A. 8), one Linde and Brown were indicted under the same penal statute with which we are here concerned. The facts pertinent to our inquiry are noted in the opinion from which we quote:

> "In this indictment Linde, Brown, and Winter alone are named. It would appear that at the time it was returned the full scope of the conspiracy was not fully known; but in the indictment others, whose names were to the grand jurors unknown, were alleged to be parties to this conspiracy. One of the main assignments of error is that the evidence as insufficient to connect these three defendants with the conspiracy, and with knowledge that the stolen cars involved were, or were to be, transported in interstate commerce. With respect to the defendants Linde and Brown we think the point is well taken. A careful consideration of the entire record convinces us that it fails to disclose any further connection with the scheme, although the existence of such a scheme and plan is abundantly established, than the receipt of a car by each of these defendants for personal use, and without proof of knowledge of the interstate character of the transaction. *There are a number of circumstances which would lead to the suspicion that both Linde and Brown knew that the cars sold or*

traded to them were stolen cars, but it does not appear that they knew whence they came, or were to come, nor that they were parties to any general plan or conspiracy having as its object the introduction of such cars from without the state for purposes of disposition and sale. *That they may have had guilty knowledge and participation rests upon suspicion only, arising from their acquaintance and association with some or all of the other conspirators; but to establish a conspiracy to violate a criminal statute the evidence must convince that the defendants did something other than participate in the substantive offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement, and in this case, in our judgment, that proof is insufficient. United States vs. Heitler et al.,* (D. C.) 274 F. 401; *Stubbs vs. United States,* (C. C. A. Ninth Circuit) 249 F. 571, 161 C. C. A. 497; *Bell vs. United States,* (C. C. A. Eighth Circuit) 2 F. (2d) 543.

"As to these two defendants, it is therefore unnecessary to consider the other errors assigned."

In *Dickerson vs. U. S.*, 18 Fed. (2d) 887 (C. C. A. 8) certain defendants were charged on conspiracy counts under Section 88, Title 18, U. S. C. A., for violation of the National Prohibition Act. The court gave repeated emphasis to the fact that from the record it did not appear that any of the alleged conspirators had informed the defendants in error of the terms of the conspiracy. In other respects the said defendants were closely identified with certain of the admitted conspirators in actual dealings with them in the business of the conspiracy while the conspiracy was in process. The

facts are detailed beginning at page 85 of the Appendix of this brief. The court held:

> *"Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.* To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement. *Linde vs. U. S.,* 13 F. (2) 59 (C. C. A. 8th Cir.); *U. S. vs. Heitler et al.,* (D. C.) 274 F. 401; *Stubbs vs. U. S.,* (C. C. A. 9th Cir). 249 F. 571, 161 C. C. A. 497; *Bell vs. U. S.,* (C. C. A. 8th Cir.) 2 F. (2d) 543; *Allen vs. U. S.,* (C. C. A.) 4 F. (2d) 688; *U. S. vs. Cole,* (D. C.) 153 F. 801, 804; *Lucadamo vs. U. S.,* (C. C. A.) 280 F. 653, 657. . . . The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy. *Iponmatsu Ukichi vs. U. S.,* (C. C. A.) 281 F. 525."

This Court in *Kuhn vs. United States,* 26 Fed. (2d) 463 (C. C. A. 9) made application of the same doctrine in its opinion by Judge Dietrich, in which the learned judge observed:

> "Upon a re-examination of the record, we have concluded that we were in error in holding the evidence sufficient to warrant a finding beyond reasonable doubt that the defendant Moon participated in the enterprise, with knowledge of its unlawful character. The most material circumstance

> against him is that he was on or about the Talbot the night the arms were taken on board. But they were in boxes or cases, and he may very well have been ignorant of the contents, or of their destination. *We think, too, we failed to attach due significance to the fact that Borreson, who freely gave evidence for the government, at no time testified that there was any communication to Moon touching the real object of the voyage.*"

To arrive at a conclusion of guilt upon the facts here appearing, circumstances would have to be presumed which are without support in the record. Facts warranting conjecture or suspicion are not sufficient, as we have endeavored to show. Evidence warranting a suspicion or an hypothesis of guilt is not substantial evidence. A presumption of fact arrived at by piling inference upon inference, and presumption upon presumption will not be recognized in either civil or criminal cases. Interesting cases in which the Federal courts have exposed the vice in reasoning of this sort, are:

> *United States vs. Ross,* 92 U. S. 281, 284; 23 L. Ed. 707; *Brady vs. United States,* 24 Fed. (2d) 399 (C. C. A. 8); *Gargotta vs. United States,* 24 Fed. (2d) 399, and cases cited.

It is respectfully submitted that there is an absence of any substantial evidence sufficient to warrant conviction upon Count 7 of the indictment.

COUNT VIII

There is no substantial evidence in the record sufficient to sustain the conviction on Count 8 of the indictment.

The facts relative to Count 8 correlate pretty well in general outline with those offered in support of Count 7. The question of knowing participation by the defedant in the fraudulent scheme as alleged in Count 4 of the indictment, looks for solution to the evidence received in support of Counts 4 and 8 as a unit.

We have heretofore discussed the quesion of the sufficiency of the evidence to establish the requisite intent to use the mails as an essential ingredient of the conspiracy. So likwise, what has been said with reference to the rules of law pertinent to an evaluation of the evidence received in support of Count 7, is equally pertinent to a consideration of this count.

We proceed now to a brief analysis of the testimony upon which it will be contended in this Court, as it was contended at the trial, that the defendant with full knowledge participated in the fraudulent scheme. This evidence falls into two groups, to wit: (1) That relating to the Wagner transaction consummated in 1925, and (2) certain statements made by the defendant to the witness Nelson and to police officers. The Wagner transaction will be discussed in some detail under assignments of error numbered 2, 3, 4 and 5, and reference is made thereto beginning at page 59 of this brief.

Reference is made to the colloquy between the witness Nelson and the defendant, appearing at pp. 51, 52 of the record. Thereat the witness testified that "with relation to the cashing of checks" that might be sent by Nelson to the defendant that there was only one time when the matter was discussed between them and that was in 1935. At that time the defendant told Nelson that "10% wasn't enough," that "the checks were getting a little hot and he would have to have more commission." The record does not show whether this conversation was held prior or subsequent to the transactions alleged in the indictment and testified to by the witnesses.

The fact that the defendant cashed some checks for Nelson, and that he discounted the checks for doing so, is not evidence of participation by the defendant in the fraudulent scheme alleged in the indictment. Nelson was part of the time a gambler, part of the time a hotel operator, part of the time an eye racqueteer. There is no suggestion in this evidence that the checks to which reference was made in the colloquy, were received by Nelson pursuant to the particular fraudulent scheme alleged in the indictment.

The statement by the defendant that "the checks are getting a little hot" only carries the inference that for some reason not shown by the record, the checks were to be questioned. The checks might have been thought by the defendant to be "hot" for any one of a thousand

reasons. The defendant knew Nelson to be a gambler, and lacking in quilities which go to the making of good citizenship.

It should be observed that after testifying to the above, and at pp. 57 and 58 of the record, Nelson testified that at no time did he ever discuss the fraudulent scheme with the defendant; "I don't remember having any discussion with him in that regard; I don't think we ever did discuss it."

So far as the record shows, the defendant's only contact with the alleged conspirators was through Nelson. If Nelson didn't tell him, who did? The police didn't tell him; the postal inspectors didn't tell him. It is unfair of the prosecuting officers to expect the defendant to exercise psychic powers and read the minds of the conspirators. It would require a whole series of inferences, one to be built upon the other, to arrive at a conclusion that because the defendant thought the checks were getting "a little hot" they had obtained that status from being procured in the particular fraudulent scheme alleged in the indictment. See cases cited supra, page 54 of this brief.

The witness Nelson testified at page 60 of the record that the "only conversation" he ever had with the defendant concerning the means by which Nelson made his livelihood, was on several occasions between 1929 and 1935, at which the defendant queried: "How are

the suckers, Slats? Are you making any big sales?" Again we inquire, what suckers? Nelson didn't answer his queries. He maintained on these occasions as he had on all others when he talked with the defendant, a stoical silence regarding the fraudulent scheme. He was not telling the defendant or anyone else about his fraudulent scheme. It was but natural that he should deceive the defendant and obscure his fraud from him, as he would from the police. Had not the defendant at all times cooperated with the police in the making of their investigations; given accurate descriptions of Nelson and of Dr. Brown; told them in 1935 that "about 16 years ago" Nelson had been engaged with Dr. Brown in the eye frauds; that Nelson was a gambler—all of which was true, and all of which would serve as invaluable clues directed to the apprehension of Nelson.

It is clear from the record that the defendant didn't trust Nelson. On the two occasions when the checks were brought to him, he refused to cash them, but did consent to send them through for collection. That he thought the checks might not be good, does not warrant an inference that the defendant knew the particular checks were obtained in the particular fraudulent scheme alleged in the indictment. *Lonabaugh vs. U. S.,* supra.

Upon a fair construction of the evidence, all entirely circumstantial, it is submitted that the record not only bristles with hypotheses connoting the innocence of the

accused, but affirmatively shows that the defendant was not aware of the fraudulent scheme alleged. At the very most, this evidence cannot rise above bare suspicion and loose conjecture.

In concluding this phase of the argument, attention is directed to the propositions and authorities presented in respect to Count 7 which are applicable here and which have been simply referred to to avoid duplication.

II

ASSIGNMENTS OF ERROR NUMBERED II, III, IV AND V

These four assignments all relate to the reception in the evidence of testimony of various witnesses, and an exhibit (No. 7) all concerning an alleged fraudulent transaction perpetrated in 1925 upon one Wagner. Due to their length, they are set forth in full in the appendix, beginning at page 71. Objections were made on the ground that the transaction occurred thirteen years prior to the date of the alleged conspiracy, and evidence in respect thereto was therefore too remote; that the transaction was not st forth in the indictment; that there is an absence of any testimony connecting the accused with said fraudulent transaction. Exceptions were taken to the ruling of the court.

The four errors assigned rest upon common ground. All were admitted, it appears, upon a single theory governing their admissibility.

The testimony and the Exhibit No. 7 noted in said assignments were inadmissible because they were too remote to have evidential value, and because the transaction to which they relate was not connected with the offenses charged in Counts 4 and 8 of the indictment.

The basis for the general rule rendering evidence of other and similar offenses inadmissible is well stated by Mr. Justice Peckham as follows:

> "To adopt as broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime which it cannot be supposed he is or will be in proper condition to meet o rexplain and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence."

The quotation is obtained from the case of *State vs. Wilson,* 113 Ore. 450, 233 Pac. 259.

The rule is stated in some of the cases, however, that where fraudulent intent is one of the material allegations in the indictment, evidence of other and similar ventures by the accused at or about the same time, is properly admissible on the question of intent. The rule as thus enunciated has been applied in cases involving use of the United States mails to defraud. *Samuels vs. U. S.,* (C. C. A. 8), 232 Fed. 536; *Riddell vs. U. S.,* 244 Fed. 695, 700 (C. C. A. 9); *Shea vs. U. S.,* (C. C. A. 6) 251 Fed. 440. In *Packer vs. U. S.,* (C. C. A. 2) 106 Fed. 906, it was held that a similar business transaction con-

ducted by the accused within a year to those charged in the indictment, was not too remote to be proved.

Much is left to the discretion of the trial judge. *Hendry vs. U. S.,* 233 Fed. 5, 13 (C. C. A. 6). But the other offenses on which evidence is offerd must be so nearly related in time and place as to have some tendency to prove the commission of the crime charged. *Sutherland vs. U. S.,* 92 Fed. (2d) 305, 306 (C. C. A. 4). A conspiracy is not an omnibus charge under which you can prove anything and everything and convict of the sins of a lifetime. *Terry vs. U. S.,* 7 Fed. (2d) 28, 30 (C. C. A. 9). In *Cooper vs. U. S.,* 9 Fed. (2d) 216 (C. C. A. 8), it was held that in a prosecution for conspiracy to defraud the government by filing false tax returns, admission of testimony that nearly two years prior to the conspiracy charged, one of the defendants asked a witness to charge inventory by cutting it in two, was error. Likewise, in *Jay vs. U. S.,* 35 Fed. (2d) 553, 554 (C. C. A. 10), the court held:

> "Counsel for the defendants contend that the court erred in admitting over their objection, testimony concerning the trunk transaction and the sale to Blairs, on the ground that such transactions took place prior to the formation of the alleged conspiracy and were independent and isolated transactions which had no bearing on the crimes charged in the indictment. We think this contention is well taken. The proof did not establish a conspiracy prior to March, 1927. The evidence was prejudicial and the conviction upon the conspiracy counts must be set aside."

With the foregoing general statements of the rule in mind, attention is directed to the testimony mentioned in the assignments and the summary of the evidence beginning at page 7 of this brief.

The Wagner transaction occurred in 1925, thirteen years prior to the return of the indictment, and ten years prior to the first subsequent incident, in which the defendant cashed a check for the conspirator Nelson. This was the Belter check received on or about September 20th, 1935. The Wagner check, which was cashed by the defendant, was a cashier's check and it was not discounted. The defendant employed an attorney to attempt collection thereof. Immediately following the incident, Nelson left "this part of the country" and did not return until 1931, and he had not seen the defendant in the interim period. The record does not show a course of dealing and a continuous series of transactions which might render the testimony admissible under the rule of this circuit announced in *Ketterback vs. U. S.*, 202 F. 377. There is an absence of the necessary connecting proof. *Schaffer vs. Commonwealth*, 72 Pa. St. 60, cited in *State vs. Wilson*, 113 Ore. 450, 464, is in point:

> "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed

the one must have done the other. Without this obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiple issues that tend to confuse and mislead the jury."

The testimony and the exhibit included in the assignments were inadmissible because the same evidenced a different conspiracy from that charged in the indictment.

The conspiracy existing in 1925, with Brown and Nelson as the participants therein, was not the same conspiracy charged in Count 8 of the indictment which is alleged to have had as parties the defendant, Nelson, Londergan, and other divers persons. Nelson left the country presumably with Brown and subsequently died. In 1929 Nelson was in the hotel business for about a year; at other times he was in the penitentiary. There is an absence of any testimony showing the existence of a conspiracy between 1925 and 1935. Nelson could not conspire with himself. The conspiracies had separate identities, and the fact that Nelson was a participant in both and that they were both directed to a common end does not affect their status as such. *Terry vs. U. S.,* 7 Fed. (2d) 28, 30 (C. C. A. 9).

To be admissible in evidence, the acts of a co-conspirator must be done while the conspiracy is pending and in furtherance of its object. *Brown vs. U. S.,* 14 S. C. 27, 39, 150 U. S. 93, 98, 37 L. Ed. 1010; *Lane vs. U. S.,* 34 Fed. (2d) 413, 416 (C. C. A. 8). The acts of

a co-conspirator prior to the formation of the conspiracy are not admissible against his co-conspirators. *Minner vs. U. S.*, 57 Fed. (2d) 506, 511 (C. C. A. 10); *Marcante vs. U S.*, 49 Fed. (2d) 156, 157 (C. C. A. 10). In *Wyatt vs. U. S.*, 23 Fed. (2d) 791, 792, it was said that when, as here, one large conspiracy is specifically charged, proof of different and disconnectd smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others *conspiring to do the thing forbidden,* sustain conviction. See also, *Terry vs. U. S.*, supra, to the same effect.

III

ASSIGNMENT OF ERROR No. VI

This assignment of error, which is set forth in the appendix because of its length (beginning at p. 78), relates to testimony given by the witness John M. Gray concerning declarations made by a co-conspirator, Roy L. Martin, out of the presence of the defendant. Objection was made upon the ground that there was no sufficient or any prima facie showing of the defendant's connection with the conspiracy charged in Count 7 of the indictment, and on the further ground that no sufficient foundation was laid for the introduction of any statements or declarations made by the said Martin out of the presence of the defendant. Exception was saved to the rulings of the court.

The testimony noted under Assignment of Error No. 6 was inadmissible because the declarations made by the co-conspirator, Martin, were made out of the presence of the defendant and were not made in furtherance of the objects of the conspiracy.

The full substance of the testimony upon this feature of the proof is set forth in the assignment of error so the objectionable declarations may be viewed in relief against the background of the evidence.

The portions particularly objectionable are as follows:

"Q. What did Martin tell you as to what he had done with the Mershon check?

A. My conversation with Roy Martin was that he mailed the check to Joe Mazurosky.

"Q. And did he tell you anything about the arrangement with Joe Mazurosky? What did he tell you?

"A. It would cost me fifteen per cent to get the check cashed through Joe Mazurosky. (Referring to the Allen check.) He told me he could send it to Portland for collection and it would cost me fifteen (15%) per cent."

The first two of the declarations were obviously not in furtherance of the objects of the conspiracy. The check had already been sent by Martin to the defendant prior to the time the statements were made by Martin. Martin was given complete control over the check. The declarations were simply narrative of a past event. Such declarations are not competent and are highly

prejudicial. *Mayola vs. United States,* 71 Fed. (2d) 65 (C. C. A. Ninth); Garrecht, C. J.)

The declarations noted under this Assignment of Error were incompetent because the declarations of one co-conspirator to another are not competent to establish the connection of a third person with the conspiracy.

It will be recalled from the record that Roy L. Martin was the only one of the alleged conspirators who was known to and by the defendant. Of the parties making up this conspiracy, to-wit: Crangle, Gray, Andrews, and Martin, the defendant knew only Martin so far as the record shows. It was Martin who knew that the defendant would cash the two checks and it was Martin who sent the checks to the defendant. The witness and co-conspirator, Gray, was not acquainted with the defendant and he so testified. There is not a syllable of evidnce suggesting that the defendant had any contact whatsoever with the other alleged conspirators.

Upon this state of the record it will readily appear that the declarations of Martin as testified to by the witness Gray, afforded the only link by which it was sought to connect the defendant with participation in the conspiracy.

The rule is established in this circuit beyond permissible controversy that the declarations of one conspirator to another are not competent to establish the connection of a third person with the conspiracy.

Mayola vs. U. S., supra; *Kuhn vs. U. S.,* 26 Fed. (2d) 463 (C. C. A. Ninth).

The testimony noted under this assignment of error was inadmissible because there is an absence in the record of any independent evidence showing that the conspiracy existed and that the accused was a party to it at the time the declarations were made.

Reference is made to the summary of the evidence relating to Count 7 of the indictment, beginning at page 18 of this brief. Without the declarations of the co-conspirator, Martin, there is an absence of any evidence showing the defendant's alleged connection with the said conspiracy or with any of the members thereof. For that reason, the declarations of Martin, being the ones particularly set forth above, and the others noted in the assignment, were objectionable and prejudicial. *Mayola vs. U. S.,* supra; *Kuhn vs. U. S.,* supra.

The declarations were peculiarly vicious and prejudicial under the state of this record because their admission served to qualify the receipt in evidence of the Allen and Mershon checks. The evidence showed that the defendant cashed the two checks obtained in each of the conspiracies. Since defendant's only participation, under any theory of the case, is found in the cashing of these checks, the receipt in evidence of the Mershon and Allen checks served to double the quantum of evidence on this material feature of the case.

Under the rule of Kuhn Case, supra, the jury should have been instructed to disregard all testimony received in support of Count 7, for the reasons heretofore assigned. That the receipt of this volume of testimony cast a blight upon the whole case, there can be no doubt. It was loaded with prejudice and this court so held, by analogy, in the Mayola Case, supra.

The legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect. *Deery vs. Cray,* 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Peck vs. Heurich,* 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; *Todd vs. United States,* 221 Fed 205, 208 (8th); *Crawford vs. United States,* 212 U. S. 183, 203, 53 L. Ed. 465, 29 S. C. 260.

CONCLUSION

The record is made up in large measure of the testimony of old people who had been defrauded by the two groups of conspirators. The case, by reason of this fact, was heavily freighted with emotional substance. Juries in such a circumstance require a scape-goat and not infrequently convict the innocent. See Pro. Borchard's work: "Convicting the Innocent," Yale University Press 1932. The explanation is found in the fallible

quality of circumstantial evidence as an instrument of proof.

It is respectfully submitted that the judgment should be reversed on the several counts of the indictment.

Respectfully submitted,

EDWIN D. HICKS,

HICKS & ADAMS,

Attorneys for Appellant.

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APPENDIX

ASSIGNMENT OF ERROR No. 2

That the Court errer in permitting the witness for the United States of America, Mr. Frank Nelson, to testify as follows:

Questions by Mr. Dillard: [139]

"Q. How did Mr. Wagner happen to give you a check for Five hundred ($500.00) Dollars?

"A. I called on Mr. Wagner at his home——

"Mr. Biggs: Just a moment, the defendant objects to the introduction of any testimony concerning the manner or means or time or place of the taking of that check. It is now shown to be set up in the indictment. It is not the basis for one of the charges made in the indictment; it is dated, as already identified, some thirteen years prior to the indictment and some nine years prior to the date the alleged conspiracy commenced, and therefore is too remote to be admitted under the theory of any similar transactions, if that is what is claimed for it.

"Mr. Dillard: It is offered, Your Honor, to show knowledge on the defendant. It will develop that—well, it is offered to show knowledge.

"The Court: The Court will admit the testimony in view of the matters that have been already testified regarding Government's Exhibit 7.

"Mr. Biggs: May we have an exception to the Court's ruling?

"The Court: Yes.

"Frank Nelson: I came into possession of the Wagner check, Exhibit 7, under the following circumstances: I called on Mr. Plummer at his home, introduced myself as a local optometrist from Vancouver, Washington, examined his eyes and told him that he had a trouble that I really didn't understand myself, that he should consult an eye, ear, nose and throat specialist, and I asked him if he knew anybody in Vancouver or Portland that he was personally acquainted with that he cared to go see, and he said that he didn't; so I told him about a party that was with me that was an eye specialist and that if he would go out and ask him to come in that he might give what information he needed, so he did that. I told him my partner (Dr. Brown) was Dr. Ainsworth. He called Brown into the house and Brown [140] performed an operation for him on his eye. At that time we were using the skin of an egg. He put that on the eye and removed it from the eye, and showed it to him and charged him Six Hundred Seventy-five ($675.00) Dollars, I think it was. We got two checks, one for One Hundred Seventy-five ($175.00) Dollars, and one for Five Hundred ($500.00) Dollars. The one for $175.00, Dr. Brown cashed at one of the banks in Vancouver, Washington. I took the other Wagner check to another bank and he refused to cash it, but the banker certified the check. I am referring now to Exhibit 7 for identification. When he refused to cash the check, I gave it to my

partner, Dr. Brown, and from that day until last year I never saw the check any more. Dr. Brown was a friend of Mr. Mazurosky as well as myself. He was the gentleman who had the store next door to Mazurosky's store, the optical store."

ASSIGNMENT OF ERROR No. 3

That the Court erred in permitting reception into the evidence of Exhibit numbered 7, offered and received in behalf of the United States of America under th following circumstances:

Questions by Mr. Dillard:

Mr. Dillard: If Your Honor please, we will offer in evidence Government's Exhibits for identification 4, 5, 7 and 26.

Mr. Biggs: If the Court please, the defendant objects to the introduction of these checks on the ground and for the reason that there has been no evidence sufficient to connect the defendant with the manner and method and means by which these checks were taken or for any other purpose, and I assume they would be immaterial if they were not offered for the purpose of connecting the defendant with that transaction; as to Exhibit 7, on the further ground and for the further reason that it is in connection with a transaction occurring more than thirteen years prior to the date of the offer, and upon that ground it is too remote to have probative force.

The Court: All these checks have the defendant's signature and they are admissible in evidence. Admitted. Exception allowed.

(The documents heretofore marked Government's Exhibits 4, 5, 7 and 26, respectively, for identification were thereupon received in evidence.)

There was thereupon received in evidence, Exhibit of the United States of America, numbered 7, which is in words and figures as follows, to-wit:

GOVERNMENT EXHIBIT 7

98-37

Vancouver, Wash., Nov. 14, 1935

Washington Exchange Bank

Payment stopped.

Pay to the
Order of O. A. Plummer $500.00
Five Hundred 00/100 Dollars
Exactly Five Hundred Dollars Exactly Exactly

HENRY WAGNER

Good for $500.00
When properly endorsed
Lloyd DuBois
P. M.
Nov. 18, 1925

(Endorsed on Back) O. A. Plummer O. A. Plummer
Henry Wagner C-15297
O. A. Plummer
Joe Mazurosky Cancelled
786 Kearney St.
Be 5581 [142]

ASSIGNMENT OF ERROR No. 4

That the Court erred in permitting the witness for the United States of America, Mr. Henry Wagner, to testify as follows:

Questions by Mr. Strayer:

Q. Mr. Wagner, will you just tell the jury the circumstances under which you made out and delivered that check?

Mr. Biggs: If the Court please, we object to the introduction of this testimony on the ground that it was to do with a transaction in the absence and not in the presence of this defendant, there being no sufficient foundation made connecting the defendant with the transaction or showing knowledge of the transaction.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Exception allowed.

Mr. Biggs: Could a continuing objection to this testimony go on, Your Honor, to prevent the necessity of instant interruption?

The Court: You will have to object to the testimony of each witness.

Mr. Biggs: But it may be a continuing objection?

The Court: As far as the testimony of the particular witness.

Mr. Biggs: Thank you.

There were two men came to my farm on the 14th day of November, 1925, who said they were eye doctors

that tried to sell us glasses. I wasn't in need of any glasses, but my brother, William, did need them; his eyes were failing and they examined his eyes and discovered that there was something wrong and finally found it was a cataract—told him it was a cataract, and said that it would have to be removed or else he would go blind, and so he submitted to the operation to remove the imperfection in his eye. Before they did that I asked them what it would cost to remove it and they said it would be nominal, the price would be nominal, and so they went to work and removed it and when they got through the bill was Seven Hundred Fifty ($750) Dollars.

They had an instrument about a foot long, a sort of rod, and they worked around in his eye with that and removed something that looked like the white of an egg, and they called that the cataract. That was the operation that was performed. [143] These parties were using the names of Dr. O. A. Plummer and Dr. J. C. Ainsworth. Mr. Plummer was a tall, slim man, rather dark, about 35 or 40 I should judge. I believe I saw him today. The other wasn't near as tall, was older, heavy set with a sloping forehead at a conspicuous angle. The older man performed the operation. When they said they wanted $750.00 I objected. They said radium was used to remove the cataract and that the value of the radium used in the operation was Six hundred fifty ($650.00) Dollars. They reduced the bill to Six hundred fifty ($650.00) Dollars and I wrote out

two checks, this one and another for One hundred seventy-five ($175.00) Dollars. The checks were handed over to Mr. Plummer. I did not see them after I delivered the checks. One of the checks was *cased,* the $175.00 one. I next saw the $500.00 check at Mr. Dubois' in the bank." [144]

ASSIGNMENT OF ERROR No. 5

That the Court erred in permittong the witness for the United States of America, Mr. William Wagner, to testify as follows:

Questions by Mr. Strayer:

My name is William Wagner, brother of Henry Wagner, and we live near Vancouver, Washington. I recognize the check you have handed me, Exhibit 7 for identification.

Q. Do you recall the circumstances under which that check was made out and delivered?

A. Yes, sir.

Q. Will you just tell the jury about it?

Mr. Biggs: If the Court please, for the purpose of the record we object to the introduction of this testinony on the grounds assigned with respect to the testinony of the brother.

The Court: The objection is overruled.

Mr. Biggs: And that will go to all the testimony on he further ground of remoteness?

The Court: Overruled. Exception allowed.

Mr. Strayer: Q. Tell us the circumstances under which your brother made out and delivered that check.

Well, this check was written for eye doctors. There were a couple of them, Plummer and Ainsworth, and they examined our eyes and told me I had a cataract on one of my eyes and if it wasn't removed I would go blind in a short time. It scared me, of course, and it scared my brother, and we issued this check in payment for the operation. The check was made out by my brother in my presence. The check was delivered to Plummer. The check was nver paid. I have seen neither of the men since then. The operation didn't help me "one bit." [145]

ASSIGNMENT OF ERROR No. 6

That the Court erred in permitting the witness for the United States of America, Mr. John M. Gray, to testify as follows:

Questions by Mr. Strayer:

Q. What did Martin tell you as to what he had done with the Mershon check?

Mr. Biggs: If the Court please, we object to the witness answering that question on the ground that it would be hearsay, there being no sufficient or any prima facie showing of any partnership in crime or otherwise between Mr. Martin and Mr. Mazurosky, and therefore no sufficient foundation laid for the intro-

duction of any statements, declarations, or evidence of any acts of omission or commission done in the absence and out of the presence of the defendant.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Yes.

A. My conversation with Roy Martin was that he mailed the check to Joe Mazurosky.

Mr. Strayer: Q. And did he tell you anything about the arrangement with Joe Mazurosky?

Mr. Biggs: If the Court please, may we make the same objection and have the continuing objection to any testimony asked for and given by this witness in connection with statements or evidence of facts or declarations on the part of Martin?

The Court: Yes.

Mr. Biggs: I make the same objection at this time, Your Honor.

The Court: The objection is overruled.

Mr. Biggs: And may I have an exception?

The Court: An exception is allowed.

Mr. Strayer: Q. What did he tell you?

A. It would cost me fifteen per cent (15%) to get the check cashed through Joe Mazurosky.

As I previously stated, my arrangement with Mrs. Martin was that she would go down with me to Joe Mazurosky's and we would obtain this money and I would take my part of the money and Mrs. Martin was to keep his part of the money. [146]

Q. And under your agreement with Martin what percentage of the check were you to receive?

A. I received a total of sixty (60%) per cent.

Q. And what was to be done mith the balance of the money?

A. Fifteen (15%) per cent would go to Joe Mazurosky for collection, twenty-five (25%) yer cent to Martin and Cragle, and sitxy (60%) per cent to Nelson and myself.

We were paying Martin and Crangle twenty-five (25%) per cent for advance information concerning these people.

Referring to the time when I received the Mershon check on October 29th, after having a conversation probably one or two days previous to that with Mr. Martin and Mr. Crangle, they told me circumstances of a fake cataract operation on Mrs. Mershon, or Mr. Mershon, one or the other of them. I went to the home of these people on this date and made an examination of the party that was supposed to be operated on, I don't recall which one now. I remember explaining that I was there for the purpose of giving them back the money in the event that it wasn't cured, that the doctor that operated on them had had an accident of some kind and probably was killed; anyhow, after my examination I told them it wouldn't be cured without the use of a radium belt and explained to them a radium belt was very valuable, only twelve of them in the United States; the doctor that made them had died with

the secret. The windup of the conversation was that they deposited this amount of money with me as surety, one of these belts to be delivered to their home and used for a period of thirty days, and that is how I obtained the check.

To my knowledge there was no such thing as a radium belt. There was nothing more the matter with these people than senility or old age. At the time I talked with them I was using the name, Dr. Pierce. I also went by the names of Miles, Hamilton, Howard, Clayton, Cox and others. I understood that the name T. A. Andrews was the correct name of the party who was with me. He also went by the name of Thomas, Judge Thomas, and I so introduced him to the Mershons. I represented Thomas as an attorney, settling the estate of the doctor ho had been killed and who had performed the operation on their eyes. Thomas is at this time in a Federal Penitentiary in Virginia. I understand Roy Martin and Herbert Crangle are in the Federal Penitentiary at Atlanta, Georgia. Crangle usually went by the name of Dr. Avery. Martin, when performing the operations, usually was represented as Dr. Miles.

Referring back to the time when I received the proceeds of the Mershon check, I will state that I met Mr. Mazurosky about a week thereafter, for the first time. I was introduced to him by Roy Martin at the St. Andrews Apartment Hotel in Portland, Oregon.

Q. And what were you doing there at the St. Andrews Apartment Hotel?

A. Mr. Martin was living there at the hotel. I was down there to see him and I just met Mr. Mazurosky, that is all.

The Allen check, Exhibit 3 for identification, which you have handed me was received by me sometime in September, 1934. I went to the home of Clara Allen and her brother somewhere around Boulder, Colorado. The exhibit is a cashier's check.

Mr. Strayer: Q. And how did you receive possession of it?

A. T. A. Andrews and I drove to the home of Clara Allen and her brother, out of Boulder, Colorado, and I talked to Miss Allen and her brother and performed a so-called fake cataract operation on the brother's eye and went to town to get this money. She drove her car and we followed in another car. She didn't have the money in the bank. They had some Liberty bonds and these were at the bank in the name of the brother and she couldn't obtain these bonds, so she had to go back home and get an order for them, and it was then too late to get the bonds out of the bank that day so I instructed her to go the following day and get the bonds or the cash money and I would be back in a few days to get it, but I didn't. I waited a couple of weeks and I sent Mr. Andrews out there early on Sunday morning. That day he returned with the check and gave it

to me. I received the check from T. A. Andrews about twelve or fifteen days after the date noted on the check. I was working with Andrews at that time.

I performed the operation on Miss Allen's brother. Due to senility, his vision was dim and I explained to him that I could make him see with radium treatment. I dropped a few drops of Murine eye water into his eye and removed a piece of skin that I had—I was supposed to have removed it—and that was all there was to it. He did have a cataract but I did nothing about it. The check was given me in payment for the operation. I was using either the name of Miles or Pierce, I am not sure which. Andrews was using the name of Thomas. Miss Allen's brother received no benefit from the operation. After receiving the check, I gave it to Roy Martin. He told me he could send it to Portland for collection and it would cost me fifteen (15%) per cent. He told me he was going to send it to Joe Mazurosky. He wrote him a letter and put it in an envelope and dropped it in a mail box in Denver, Colorado. After he mailed the letter, I later received the proceeds of the check. Mr. Martin gave me Five Hundred ($500) Dollars less fifteen (15%) per cent, which is Seventy-five ($75) Dollars, in Seattle—a few dollars less than that because he told me that the money had been wired to him. That was about the first or second week in October, 1934. I went back to see Miss Allen in 1935. When I was there the first time they had two thousand dollars in Liberty bonds and I went back there to get the

balance of them if I could. I talked to Miss Allen; found her in the cow pen milking a cow. It was early in the morning. I went in and talked to her and she didn't recognize me. As soo as I began to talk about eyes she told me she had been swindled out of Five Hundrd ($500) Dollars and if I would go down town and talk to the district attorney he would tell me all about it, and so that was all I wanted to know and I drove away. She did not recognize me as one of the men who had been there before. I wore no disguise.

(The check, Government's Exhibit 15 for Identification, was thereupon marked.)

The first time I ever saw the exhibit marked Government's Exhibit 15 for identification was at the trial in Portland. I can't say that I recognize the handwriting. When Martin sent the checks to Joe Mazurosky, he used the name of R. E. Terrell.

DIGEST OF PERTINENT FACTS

Dickerson vs. United States, 18 Fed. (2d) 887:

"After a careful consideration of the record, we are satisfied that the evidence upon which the government must depend to connect the plaintiffs in error with the conspiracy is that *they bought some of the liquor,* and that at the time the alcohol was being taken away from the Red Line Transfer & Storage Company building at Des Moines on the 20th of March, 1923, *it was said by Chapman* (who had been employed by the original conspirators, after the alcohol had arrived from Peoria at Des Moines and had been removed from the car and stored in the Red Line Transfer Company's building to sell it) *in the presence of the plaintiffs in error, that the alcohol had come from Peoria, and the further testimony that each of the drums bore the legend: 'Complete denatured alcohol, proof 188. Kentucky Distilleries & Warehouse Company D. P. 141st Dist. Ill. Formula 5 I. C. C. 10.'*

The claim made by the government, and stated in their brief, that the plaintiffs in error were present when the car of alcohol came in from Peoria and was unloaded, is not borne out by the evidence. While Kelso, the witness, at first stated, he afterwards changed his testimony and said he was mistaken about that. *The most that can be said of this testimony is that it conveyed knowledge to the plaintiffs in error that the alcohol had been shipped from Peoria to Des Moines.*

The testimony of Kelso on this point is very weak, but, assuming it to be true, we do not think it is sufficient to charge the plaintiffs in error with knowledge of the conspiracy. *The record shows very clearly that the plaintiffs in error had never*

taken any part in the general conspiracy or scheme and never knew of its existence, never participated in the profits or took any part in it in any manner, unless this can be inferred from the mere fact that at the time that the alcohol was delivered to them, some days after they had paid for it, they acquired the knowledge that the alcohol had been shipped from Peoria. There is, of course, the further fact that they purchased a large quantity of the alcohol from one or more of the conspirators. The evidence introduced by the government shows clearly that neither Hunnell nor Chapman, nor any of those who had to do with selling the liquor to the plaintiffs in error, gave them any information whatever concerning the conspiracy, or even as to where the liquor had come from.

This is the sum total of all the evidence upon which the government must depend to connect the plaintiffs in error with the conspiracy. The other evidence in the record touching this point is affirmative evidence introduced by the government to the effect that none of the conspirators who dealt with the plaintiffs in error informed them of the conspiracy or anything about it. . . .

It will further be observed that Chapman was not in on the deal at all until after Hunnell and Schaller had been unable to dispose of the product, and it is Chapman whom the witness Kelso testified made the remark at the Red Line Transfer & Storage Company on the 20th of March, 1923, that the car had come from Peoria. *As to the plaintiff in error, Eaton, the record is without dispute that he was not only not informed by any of the conspirators, but that he himself made inquiry of Berg if there was alcohol in the warehouse for sale, and Berg then called Schaller, and got Schaller's consent to sell two drums of alcohol to Eaton."*